# In the Supreme Court of the State of Alaska

**Thomas J. Knolmayer, MD, and Alaska Trauma and Acute Care Surgery, LLC,**
Petitioners,

v.

**Charina McCollum and Jason McCollum,**
Respondents.

Trial Court Case No. 3AN-16-04601CI

Supreme Court No. **S-17792**

## Order
Petition for Review

Date of Order: **9/29/2020**

Before: Bolger, Chief Justice, Winfree, Maassen, Carney, and Borghesan, Justices

On consideration of the Petition for Review filed on 5/26/2020, and the response filed on 6/8/2020,

**IT IS ORDERED**:

1. The Petition for Review is **GRANTED** for the purpose of submitting to the parties the questions posed in paragraph 7, below.

2. The Petitioners will have until **10/09/2020** to either designate a transcript pursuant to Appellate Rule 210(b) or file notice that a designation will not be filed. Within 10 days following the Petitioners' designation or notice, Respondents may designate additional portions of the proceedings to be transcribed.

3. The Notice of Completion of Preparation of File is due from the Appellate Court Records Office (ACRO) on or before **10/29/2020**.

4. Following the certification of the record, the Petitioners' brief notice will issue. Formal briefs conforming to Appellate Rule 212 and excerpts conforming to Appellate Rule 210 shall be filed. Briefing and excerpting shall proceed on the **expedited** schedule prescribed in Appellate Rule 218(f).

5. We invite the State of Alaska, the Alaska Association for Justice, the Alaska State Medical Association and/or the Alaska State Hospital and Nursing Association, and Aetna, Inc. (The Lowe's Companies, Inc. Employee Benefits Plan) to participate in the briefing as amici curiae. Notice of participation and party alignment is due on or before **10/29/2020**.

6. Oral argument will be scheduled when briefing is complete.

7. The questions submitted to the parties are based on the following understanding of the underlying facts. Charina and Jason McCollum filed a medical malpractice lawsuit against Thomas J. Knolmayer, M.D. and Acute Care Surgery, LLC, asserting that Charina suffered physical injury as a result of negligent medical care. Charina seeks to recover, as part of the damages from her alleged injury, the medical expenses she claims were incurred as a result of the alleged medical malpractice. A substantial portion of those medical expenses were paid by Charina's employment-related, ERISA-regulated medical insurance plan (Plan).

The Plan requires that it be reimbursed for medical expense payments made on behalf of an injured insured who ultimately recovers damages from a tortfeasor. The Plan creates options for the Plan's administrator to enforce this subrogation right. The Plan, at its discretion, may "in its own name or in the [insured's] name" sue the tortfeasor for the medical expenses paid, or the Plan may allow the insured to bring the claim and then obtain reimbursement from the insured. In the latter event, the Plan asserts a putative right to full reimbursement for the medical expenses paid, "without deduction for attorney's fees and costs or application of the common fund doctrine, make whole doctrine or any similar legal theory, without regard to whether the [insured] is fully compensated by his or her recovery from all sources. [And if the insured's] recovery is less than the benefits paid, then the Plan is entitled to be paid all of the recovery achieved." It appears from the current material presented to us that the parties agree the Plan could intervene as a party to assert a claim for the medical expenses it paid on Charina's behalf as a result of the alleged medical malpractice.

The following legal framework also underlies the questions submitted to the parties. Alaska Statute 09.55.548(b) creates a specific collateral source rule applicable to

medical malpractice lawsuits:

> Except when the collateral source is a federal program that by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant that exceed amounts received by the claimant as compensation for the injuries from collateral sources, whether private, group, or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program that must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award.

In *Reid v. Williams* we considered and rejected two constitutional challenges — on due process and equal protection grounds — to AS 09.55.548(b)'s collateral source limitation.[1] Contractual subrogation was not raised in that case. We have not considered whether the statute violates substantive due process when applied to an injured party subject to contractual subrogation, absent a related statutory proscription against enforcement of the contractual subrogation. And we have not considered an equal protection claim based on classifications of injured parties with and without contractually subrogated collateral source compensation or injured parties with federal programs required by law to seek subrogation and those with medical benefit programs having only contractual subrogation rights.

We therefore submit to the parties and amici the following questions:

1. Is McCollum's ERISA-regulated medical insurance policy part of a

---

[1] 964 P.2d 453, 455, 460 (Alaska 1998) (summarizing that statutory reduction of damages award did not violate injured party's substantive due process right or injured party's equal protection right based on asserted unlawful discrimination between classifications of medical malpractice defendants and other tort defendants; also noting separately that courts reviewing similar statutes under similar rational basis test have decided there is no unlawful discrimination based on classifications involving both plaintiffs and defendants in medical malpractice as opposed to other torts).

"federal program" contemplated by AS 09.55.548(b)?

If the answer to Question #1 is "no,"

2. Does AS 09.55.548(b) apply to bar a medical malpractice plaintiff from seeking recovery of an insurer's contractually subrogated claim for medical payments made on behalf of the plaintiff?

3. Can an insurer assign a contractually subrogated claim to a plaintiff for collection purposes in a medical malpractice lawsuit? Was there an effective assignment in this case given the contractual subrogation provision's language?

4. Does AS 09.55.548(b) violate the Alaska Constitution's due process or equal protection guarantees if applied to a plaintiff whose insurer has contractual subrogation rights to collect from the plaintiff's recovery against a medical malpractice defendant? Or does applying AS 09.55.548(b) to a plaintiff whose insurer has contractual subrogation rights to collect from the plaintiff's recovery require that such subrogation rights be invalidated?

Entered at the direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

cc: Trial Court Appeals Clerk
State of Alaska, Department of Law, Attorney General's Office
Alaska Association for Justice
Alaska State Medical Association
Alaska State Hospital And Nursing Association
Aetna, Inc.

Distribution:

Mail:

Aetna, Inc.

Alaska State Medical Association

Alaska State Hospital and Nursing Association

Email:

Lazar, Howard A.

Cohn, Michael

State of Alaska, Department of Law

Alaska Association for Justice